

THE OFFICE OF CONTRACTING AND PROCUREMENT

NOTICE OF EMERGENCY AND PROPOSED RULEMAKING

The Chief Procurement Officer of the District of Columbia, pursuant to authority granted to the Mayor by section 204 of the District of Columbia Procurement Practices Act of 1985 (PPA), effective February 21, 1986 (D.C. Law 6-85; D.C. Official Code § 2-302.04), Title II of the Child and Youth, Safety and Health Omnibus Amendment Act of 2004, effective April 13, 2005 (D.C. Law 15-353; D.C. Official Code § 4-1501.01 *et seq.*)(2006 Supp.), as amended by Title II of the Omnibus Public Safety Amendment Act of 2006, effective April 24, 2007 (D.C. Law 16-306; 54 DCR 6577) (Act), Mayor's Order 2002-207 (dated December 18, 2002) and Mayor's Order 2007-95 (dated April 18, 2007) hereby gives notice of the adoption of the following emergency rules and of the intent to adopt final rulemaking to add a new Chapter 5 of Title 27 of the District of Columbia Municipal Regulations (Contracts and Procurement). The rulemaking is intended to implement section 211 of Title II of the Act authorizing the Mayor to issue rules requiring that criminal background and traffic records checks be obtained for applicants for employment with, and employees and unsupervised volunteers of any private entity that contracts with the District to provide direct services to children or youth as those terms are defined in the Act.

Mayor's Order 2007-95 delegates to the Chief Procurement Officer the authority vested in the Mayor in section 211 of the Act to issue rules governing the criminal background check and the traffic record check requirements in sections 203 and 204(b)(2) of the Act, for persons and private entities being considered for contractual work providing direct services to children and youth for District covered agencies.

The rules were originally adopted as emergency and proposed rules on August 17, 2007 and published in the *D.C. Register* on September 7, 2007, at 54 DCR 8846. After Council review, certain changes were made which required substantive changes to the rules as originally adopted.

This emergency rulemaking action, pursuant to section 6(c) of the District of Columbia Administrative Procedure Act, effective October 21, 1968 (82 Stat. 1206; D.C. Official Code § 2-505(c)), is justified by the need to ensure preservation of the welfare of children and youth being served by contractors with the District of Columbia agencies listed in Mayor's Order 2007-95. These emergency rules will replace those currently in effect, and remain in effect up to one hundred twenty (120) days from date of adoption, unless earlier superseded by another rulemaking notice or by publication of a Notice of Final Rulemaking in the *D.C. Register*.

The Chief Procurement Officer also gives notice of intent to take final rulemaking action in not less than thirty (30) days from the date of publication of this notice in the *D.C. Register*. The Chief Procurement Officer will submit the rules to the Council of the District of Columbia for a

sixty (60) day period of review pursuant to subsection 205(b) of the PPA (D.C. Official Code § 2-302.05(b)), and will not take final rulemaking action until completion of the 60-day review period or Council approval of the rules by resolution before the end of the review period.

A new Chapter 5 is added to Title 27 to read as follows:

CHAPTER 5

CRIMINAL BACKGROUND AND TRAFFIC RECORDS CHECKS FOR DISTRICT GOVERNMENT CONTRACTORS THAT PROVIDE DIRECT SERVICES TO CHILDREN OR YOUTH

500 GENERAL PROVISIONS

- 500.1** A private entity that provides services as a covered child or youth services provider, as defined in section 202(3) of the Child and Youth, Safety and Health Omnibus Amendment Act of 2004, effective April 13, 2005 (D.C. Law 15-353; D.C. Official Code § 4-1501.01 *et seq.*), as amended (Act), shall obtain criminal history records to investigate persons applying for employment, in either a compensated or an unsupervised volunteer position, as well as its current employees and unsupervised volunteers.
- 500.2** A private entity is required to obtain traffic records to investigate persons applying for employment, or current employees and volunteers of private entities, when that person will be required to drive a motor vehicle to transport children in the course of performing his or her duties.
- 500.3** The following individuals are not required to submit to a criminal background check:
- (a) Applicants for, or employees or volunteers working in positions at a private entity that will not bring them in direct contact with children or youth;
 - (b) Applicants, employees and volunteers who have federal security clearance; or
 - (c) Volunteers who have only supervised contact with children or youth.

501 NOTICE TO PRIVATE ENTITY

- 501.1** Each solicitation and contract subject to the Act, shall:
- (a) identify the positions that will require a criminal background check and/or a traffic record check;

- (b) contain a clause requiring the private entity to inform all applicants requiring a criminal background check that a criminal background check must be conducted on the applicant before the applicant may be offered a compensated position or an unsupervised volunteer position;
- (c) contain a clause requiring the private entity to inform all applicants requiring a traffic records check that a traffic records check must be conducted on the applicant before the applicant may be offered a compensated position or a volunteer position;
- (d) contain a provision requiring the private entity to obtain a written authorization from each applicant, employee and unsupervised volunteer which authorizes the District to conduct a criminal background check;
- (e) contain a provision requiring the private entity to obtain a written confirmation from each applicant, employee and unsupervised volunteer stating that the private entity has informed him or her that the District is authorized to conduct a criminal background check;
- (f) contain a provision requiring the private entity to obtain a signed affirmation from each applicant, employee and unsupervised volunteer stating whether or not they have been convicted of a crime, pleaded nolo contendere, are on probation before judgment or placement of a case upon a stet docket, or have been found not guilty by reason of insanity, for any sexual offenses or intra-family offenses in the District of Columbia or their equivalent in any other state or territory, or for any of the following felony offenses or their equivalent in any other state or territory:
 - (i) Murder, attempted murder, manslaughter, or arson;
 - (ii) Assault, assault with a dangerous weapon, mayhem, malicious disfigurement, or threats to do bodily harm;
 - (iii) Burglary;
 - (iv) Robbery;
 - (v) Kidnapping;
 - (vi) Illegal use or possession of a firearm;
 - (vii) Sexual offenses, including indecent exposure; promoting, procuring, compelling, soliciting, or engaging in prostitution; corrupting minors (sexual relations with children); molesting; voyeurism; committing sex acts in public; incest; rape; sexual assault; sexual battery; or sexual abuse; but excluding sodomy between consenting adults;
 - (viii) Child abuse or cruelty to children; or

- (ix) Unlawful distribution of or possession with intent to distribute a controlled substance.
- (g) contain a provision requiring the private entity to obtain a written acknowledgement from each applicant, employee and unsupervised volunteer stating that the private entity has notified them that they are entitled to receive a copy of the criminal background check and to challenge the accuracy and completeness of the report;
- (h) contain a provision requiring the private entity to obtain a written acknowledgement from each applicant, employee and unsupervised volunteer stating that the private entity has notified them that they may be denied employment or a volunteer position, or may be terminated as an employee or volunteer based on the results of the criminal background check;
- (i) contain a provision requiring the private entity to inform each applicant, employee and unsupervised volunteer that a false statement may subject them to criminal penalties; and
- (j) contain a provision requiring the District to identify the positions that will require a criminal background check and/or a traffic records check upon the exercise of each option period of the contract or at any other time specified in the contract.

502 RESPONSIBILITIES OF PRIVATE ENTITY

502.1 Before any applicant for employment with a private entity, in either an employee or an unsupervised volunteer position, may be offered a position, the private entity shall inform the applicant that a criminal background check must be conducted on him or her.

502.2 Prior to requesting a criminal background check, the private entity shall provide each applicant, employee, or unsupervised volunteer with a form or forms to be utilized for the following purposes:

- (a) To authorize the Metropolitan Police Department or other entity, as appropriate, to conduct the criminal background check and confirm that the applicant, employee, or unsupervised volunteer has been informed that the private entity is authorized and required to conduct a criminal background check;
- (b) To affirm whether or not the applicant, employee, or unsupervised volunteer has been convicted of a crime, has pleaded nolo contendere, is on probation before judgment or placement of a case upon a stet

docket, or has been found not guilty by reason of insanity for any sexual offenses or intra-family offenses in the District of Columbia or their equivalent in any other state or territory of the United States, or for any of the felony offenses described in section 501.1(f) of this chapter;

- (c) To acknowledge that the applicant, employee, or unsupervised volunteer has been notified of his or her right to obtain a copy of the criminal background check report and to challenge the accuracy and completeness of the report;
- (d) To acknowledge that the private entity may choose to deny the applicant employment, assignment to, or an unsupervised volunteer position for which a criminal background check is required based on the outcome of the criminal background check; and
- (e) To inform the applicant or employee that a false statement on the form or forms may subject them to criminal penalties as described in section 506 of this chapter.

- 502.3** The private entity shall direct the applicant or employee to complete the form or forms specified in section 502.2 and notify the applicant or employee when and where to report to be fingerprinted.
- 502.4** Unless otherwise provided in the contract, private entities shall request criminal background checks from the Chief, Metropolitan Police Department (or designee), who shall be responsible for conducting criminal background checks, including fingerprinting, for private entities.
- 502.5** Unless otherwise provided in the contract, private entities shall request traffic record checks from the Director, Department of Motor Vehicles (or designee), who shall be responsible for conducting traffic record checks for private entities.
- 502.6** Private entities shall pay for the costs for the criminal background checks and traffic record checks required under this chapter and the Act, pursuant to the requirements set forth by the Metropolitan Police Department and the Department of Motor Vehicles.
- 502.7** A private entity may make an offer of appointment to, or assign a current employee or applicant to, a compensated position contingent upon receipt from the contracting officer of the Contracting Officer's Technical Representative's (COTR) decision after his or her assessment of the criminal background or traffic record check.
- 502.8** A private entity may not make an offer of appointment to an unsupervised volunteer whose position brings him or her into direct contact with children until

it receives from the contracting officer the COTR's decision after his or her assessment of the criminal background or traffic record check. .

- 502.9** A private entity shall not employ or permit to serve as an unsupervised volunteer an applicant or employee who has been convicted of, has pleaded nolo contendere to, is on probation before judgment or placement of a case on the stet docket because of, or has been found not guilty by reason of insanity for any sexual offenses involving a minor.
- 502.10** Private entities shall conduct periodic criminal background checks as specified in the contract for current employees and unsupervised volunteers.
- 502.11** An employee or unsupervised volunteer may be subject to administrative action including, but not limited to, reassignment or termination at the discretion of the COTR after his or her assessment of a criminal background or traffic record check.
- 502.12** If any application is denied because the COTR determines that the applicant presents a present danger to children or youth, the private entity shall notify the applicant of such determination and inform the applicant in writing that she or he may appeal the denial to the Commission on Human Rights within thirty (30) days of the determination.

503 ASSESSMENT OF INFORMATION FROM CRIMINAL BACKGROUND AND TRAFFIC RECORDS CHECKS

- 503.1** The COTR for the contract shall be solely responsible for assessing the information obtained from each criminal background check report to determine whether a final offer may be made to each applicant or employee. The COTR shall inform the contracting officer of its decision, and the contracting officer shall inform the private entity whether an offer may be made to each applicant.
- 503.2** The COTR for the contract shall be solely responsible for assessing the information obtained from each traffic records check to determine whether a final offer may be made to each applicant or employee. The COTR shall inform the contracting officer of its decision, and the contracting officer shall inform the private entity whether an offer may be made to each applicant.
- 503.3** The information obtained from the criminal background check shall not create a disqualification or presumption against employment or volunteer status of the applicant unless the COTR determines that the applicant poses a present danger to children or youth. The COTR shall consider the following factors to determine whether a final offer may be made to each applicant or employee:

- (a) The specific duties and responsibilities necessarily related to the employment sought;

- (b) The bearing, if any, the criminal offense for which the person was previously convicted will have on his or her fitness or ability to perform one or more of such duties or responsibilities;
- (c) The time which has elapsed since the occurrence of the criminal offense;
- (d) The age of the person at the time of the occurrence of the criminal offense;
- (e) The frequency and seriousness of the criminal offense;
- (f) Any information produced by the person, or produced on his or her behalf, regarding his or her rehabilitation and good conduct since the occurrence of the criminal offense; and
- (g) The public policy that it is beneficial generally for ex-offenders to obtain employment.

504 ACTION AGAINST CONTRACTOR

504.1 The contracting officer may take action, in accordance with the “Default” provision the contract, against any private entity who is found to have violated the provisions of this chapter.

505 CONFIDENTIALITY

505.1 Criminal background check reports obtained under this section shall be confidential and are for the exclusive use of making employment-related determinations under this chapter. Private entities shall not release or otherwise disclose the reports to any person, except when:

- (a) Required as one component of an application for employment with the private entity;
- (b) Requested by the contracting officer or COTR during an official inspection or investigation;
- (c) Ordered by a court;
- (d) Authorized by the written consent of the person being investigated;
- (e) Otherwise required by the contract; or

- (f) Utilized for a corrective or adverse action in a personnel proceeding, including but not limited to, an administrative action under section 502.10.

505.2 An individual who discloses confidential information in violation of this section is guilty of a criminal offense and, upon conviction, shall be fined not more than \$1,000 or imprisoned for not more than 180 days, or both.

506 PENALTY FOR PROVIDING FALSE INFORMATION

506.1 An applicant for employment or a volunteer position with a private entity who provides false information in the course of applying for the position shall be subject to prosecution pursuant to section 404 of the District of Columbia Theft and White Collar Crimes Act of 1982 (D.C. Law 4-164; D.C. Official Code § 22-2405), and, upon conviction, shall be fined not more than \$1,000 or imprisoned for not more than 180 days, or both.

507 RIGHT TO APPEAL CONTRACTING OFFICER'S TECHNICAL REPRESENTATIVE'S DECISION

507.1 If a COTR denies an application, the COTR shall notify the contracting officer who shall advise the private entity to notify applicant of such determination. The private entity shall inform the applicant in writing that she or he may appeal the denial to the Commission on Human Rights within thirty (30) days of the determination.

599 DEFINITIONS

599.1 When used in this chapter, the following terms have the meaning ascribed:

Act - Child and Youth, Safety and Health Omnibus Amendment Act of 2004, effective April 13, 2005 (D.C. Law 15-353; D.C. Official Code § 4-1501.01 *et seq.*)(2006 Supp.), as amended by Title II of the Omnibus Public Safety Amendment Act of 2006, effective April 24, 2007 (D.C. Law 16-306; 54 DCR 6577).

Applicant – an individual who has filed a written application for employment, or who has made an affirmative effort through a written application or a verbal request to serve in an unsupervised volunteer position, with a private entity.

Children – individuals twelve (12) years of age and under.

Covered child or youth services provider – any District government agency providing direct services to children and youth and any private entity that contracts with the District to provide direct services to children and youth, or for the benefit of children or youth, that affect the health, safety, and welfare of children or youth, including individual and group counseling, therapy, case management, supervision, or mentoring.

In accordance with Mayor's Order No. 2007-95, the following District agencies shall be subject to the criminal background check and traffic records check provisions of the Act and this chapter for purposes of their own activities, and the activities of private entities and who are parties to contracts entered into on behalf of the following agencies by the Office of Contracting and Procurement:

- * Department of Human Services
- * Department of Health
- * Department of Parks and Recreation
- * Fire and Emergency Medical Services Department
- * Metropolitan Police Department
- * Office of the State Superintendent of Education
- * Department of Mental Health
- * Child and Family Services Agency
- * Department of Youth Rehabilitation Services
- * Department of Employment Services
- * Department on Disability Services
- * Any other agency which as a result of a permanent or temporary change to its mission such as may be caused by reorganization or a similar reason shall become a covered child or youth services provider subject to the Act

Criminal background check – the investigation of an individual's criminal history through the record systems of the Federal Bureau of Investigation and the District of Columbia Metropolitan Police Department.

Employee – an individual who is employed on a full-time, part-time, temporary or contractual basis by a private entity.

Private Entity – any private entity that contracts with the District to provide direct services to children or youth, or for the benefit of children or youth, that affect the health, safety, and welfare of children or youth, including individual and group counseling, therapy, case management, supervision, or mentoring.

Supervised – any person who is under the direct supervision, at all times, of an employee or a volunteer who has received a current, satisfactory criminal background check.

Volunteer – an individual who works without any monetary or any other financial compensation for a private entity.

Youth – an individual between thirteen (13) and seventeen (17) years of age, inclusive.

All persons desiring to comment on the subject matter of this proposed rulemaking should file comments, in writing, no later than thirty (30) days after the date of publication of this notice in the *D.C. Register*. Hand-delivered comments should be delivered, and mailed comments should be postmarked, no later than thirty (30) days after publication of this notice in the *D.C. Register*.

Comments should be delivered or mailed to the Chief Procurement Officer, Office of Contracting and Procurement, 441 Fourth Street, N.W., Suite 700 South, Washington, D.C. 20001. Copies of the proposed rules may be obtained from the above address.